

NTSB Order No. EA-4036

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 29th day of November, 1993

Docket SE-11988

Respondent has appealed from the oral initial decision of Administrative Law Judge William R. Mullins, issued on December 3, 1991, following an evidentiary hearing.¹ The law judge affirmed an order of the Administrator alleging that respondent had violated 14 C.F.R. 91.123(a), and 91.13(a).² We deny

²Section 91.123(a), as pertinent, provides:

respondent's appeal.³

Respondent was the pilot-in-command of Continental Airlines flight 238 from John Wayne Airport, Orange County, CA, to Houston, TX, on August 31, 1990. He was cleared by ATC to the following routing: Musel 5 Standard Instrument Departure, Thermal transition via airway J169 to Blythe and from there on to Houston. See Exhibit A-6. At Thermal, the aircraft did not change course, as the clearance directed, toward Blythe.⁴ Instead of continuing east, at Thermal the aircraft turned north fairly abruptly, creating a loss of separation with another aircraft traveling on a different airway. Respondent had
(..continued)

(a) When an ATC [air traffic control] clearance has been obtained, no pilot in command may deviate from that clearance, except in an emergency, unless an amended clearance is obtained.

Respondent does not allege an emergency, nor was an amended clearance obtained.

§ 91.13(a) provides:

No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

³The law judge dismissed, as duplicating the § 91.123(a) charge, an added charge that respondent violated § 91.181(a). The Administrator did not appeal that dismissal.

⁴Respondent appears to suggest, in passing (Appeal at 14), that the Administrator may not prevail because he did not provide evidence of the exact clearance respondent was given and, therefore, did not prove that respondent deviated from it. At the hearing, however, respondent did not contest the Administrator's claim that he had deviated from his clearance (see, e.g., Tr. at 21, Exhibits A-5 and A-6). The claim, therefore, stands un rebutted. Respondent's letter (Exhibit R-1) can also be read as an admission of a course deviation.

departed airway J169, and was on a course deviation of approximately 70 degrees. Tr. at 45. Respondent was contacted by ATC and directed to change course.⁵ Unchallenged radar plotting of respondent's aircraft indicated that the deviation continued for approximately 1 and 1/2 minutes before respondent began a turn back to the east. Exhibit A-5 and Tr. at 47-48.

The parties appear to agree that the deviation was caused by a malfunction in the aircraft's flight management computer (FMC).⁶ At the hearing, respondent testified that he was aware of the course deviation when it occurred and had spent the time up until being contacted by ATC in determining what his prescribed course should be and what corrective action to take to return to that course. Tr. at 107. At the time of the deviation, he testified, the FMC was showing Blythe as the next way point, but the course deviation indicator showed "north 355."

Tr. at 109.⁷ Respondent testified that he needed to turn to a third source -- charts aboard the aircraft -- to resolve the

⁵ATC directed a course change to 080. The unrebutted evidence indicates that respondent confirmed 060 but, as this was sufficient to clear the other aircraft, ATC did not pursue the inconsistency. Tr. at 33.

⁶See Tr. at 75, where an FAA safety inspector testified that he did not believe the northerly turn was deliberate. Respondent believes that the Administrator's failure to prove how the anomaly occurred somehow undermines the case against him. We fail to see how. How or why the malfunction occurred is, as discussed supra, not a necessary part of the Administrator's case or argument.

⁷Respondent testified that the FMC showed a Blythe heading of 078 when the CDI was showing 355. Tr. at 114. The aircraft apparently was responding to the CDI direction rather than the Blythe heading in the FMC, thus producing the uncommanded turn.

problem. The first chart he chose (the standard instrument departure chart) did not contain information for Blythe. He found Blythe on the high altitude chart, overrode the autopilot, and testified that he had just begun the right turn back to his cleared course when ATC contacted him. Tr. at 112. He testified that this process took him 45-50 seconds. Tr. at 114. Respondent contended that he should not be faulted for an equipment error, that he could reasonably rely on the autopilot equipment to work properly, and that he reacted quickly to the problem.

The Administrator argued, and the law judge found, that respondent's primary job was to "aviate," and that the substantial course/clearance deviation indicated that someone was not doing his job. In the law judge's view, respondent failed to correct the aircraft's routing in a reasonable time because he did not know the flight plan sufficiently.⁸ The law judge also held that respondent "should have been able to get the aircraft back on some semblance of a[n] easterly direction until [he] got the situation figured out rather than leave it on autopilot and let it take you all the way around" Tr. at 187-188.

⁸Respondent had admitted that he was not familiar with this route. Tr. at 126.

A witness for the Administrator testified, unrebutted, that, had the problem been corrected more quickly, within approximately 30 seconds (i.e., because details of the flight plan were known sufficiently to stay on course to Blythe), respondent would not have departed the airway and, therefore, would not have deviated from his clearance. Tr. at 61.

Nothing in respondent's appeal convinces us that the law judge's analysis is incorrect or inappropriate.⁹ We do not agree with respondent that he should be entitled to rely on the aircraft's automatic navigation system to the extent of that reliance argued here, so as to remove any responsibility by the pilot to know specific flight routings.¹⁰ Respondent's argument might carry weight if it had been proven that respondent had access to **no** working instruments that could tell him his heading. But that was not the case here.¹¹

Had respondent known the routing to Blythe, he could immediately have regained it and avoided the loss of separation. Thus, although his obtaining the necessary information as quickly as he did is admirable, his need to search charts at all,

⁹The law judge opined that, in the absence of the suspension waiver that followed from respondent's Aviation Safety Reporting Program filing, he would have imposed a 30-, rather than a 45-day suspension, as proposed by the Administrator. We do not adopt the law judge's opinion as to this matter, in light of precedent holding that law judges should refrain from offering such gratuitous comments when the Administrator has waived service of any suspension. Administrator v. Friday, NTSB Order EA-2894 (1989), slip op. at 6.

¹⁰Respondent does not contend that the flight plan for the aircraft was especially long or complicated. Moreover, respondent admitted that he knew of the problems in this equipment in the form of uncommanded altitude changes in the mode control panel. Tr. at 122.

¹¹Thus, Administrator v. Anderson, 4 NTSB 1069 (1983), where respondents used equipment that, unbeknownst to them, was not working properly, is not on point. In Anderson, for one, the equipment was giving consistent (albeit erroneous) readings through much of the flight, lulling the crew into a false sense of security. Here, there is no argument that respondent did not know something serious was wrong and was easily able to correct it.

or, alternatively, his failure to keep the aircraft on the prior easterly heading while he was looking for the necessary information, led the aircraft substantially off course, off the federal airway, and into conflict with another passenger-carrying flight. We agree with the law judge's sentiment that, even if events transpired as respondent testified (i.e., that he recognized immediately that the aircraft was veering off course), respondent should have been able to keep the aircraft in a more easterly heading while he determined the proper course.¹²

Respondent also argues that the law judge based his decision on feelings, rather than facts in evidence and Board precedent. We disagree. The law judge committed no error in considering the record in light of his own experience; it would be difficult for any adjudicator to do otherwise. What a law judge may not do -- and what the law judge here did **not** do -- is to substitute personal feelings or experience for evidence in the record, or to ignore that evidence. The law judge simply concluded, and we agree, that, irrespective of the systems available on the aircraft, respondent should have known his flight plan sufficiently to remain within the airway on which he was cleared.

¹²We find unavailing respondent's attempt to distinguish cases where violations were affirmed based on a crew member's clear error in use of aircraft systems or equipment. Here, respondent's failure was not in his use of equipment but a failure to be adequately prepared.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied; and
2. The initial decision is affirmed.

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HAMMERSCHMIDT, and HALL, Members of the Board, concurred in the above opinion and order.